

BUSINESS ASSOCIATE AGREEMENT

THIS AGREEMENT (the "Business Associate Agreement") is made and effective as of this ____ day of _____, 20__ (the "Effective Date"), by and between **eScan Data Systems, Inc.**, a Texas corporation ("Business Associate"), and __[insert Provider's Name]__ ("Covered Entity").

WHEREAS, Business Associate and Covered Entity are in discussions regarding Business Associate providing software application services to Covered Entity pursuant to a Software License Agreement between Business Associate and Covered Entity (the "License Agreement") which will involve the use or disclosure of information which meets the statutory definition of Protected Health Information (defined below) under the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Part 160 and Part 164, Subparts A and E (the "Privacy Rule"), as amended by Subtitle D of the Health Information Technology for Economic and Clinical Health Act (the "HITECH Act"), as Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (Pub.L. 111-5).

WHEREAS, under the Privacy Rule, Covered Entity and Business Associate must enter into a written business associate agreement with respect to the use and disclosure of Protected Health Information.

NOW THEREFORE, in consideration of the mutual provisions contained herein, it is agreed as follows:

1. **Definitions.** Terms used, but not otherwise defined, in this Business Associate Agreement shall have the same meaning as those terms in the Privacy Rule.
 - 1.1 **Breach.** "Breach" shall have the same meaning as the term "breach" in § 13400 of the HITECH Act and shall include the unauthorized acquisition, access, use, or disclosure of PHI that compromises the security or privacy of such information.
 - 1.2 **Designated Record Set.** "Designated Record Set" shall have the same meaning as the term "designated record set" in 45 CFR § 164.501.
 - 1.3 **Individual.** "Individual" shall have the same meaning as the term "individual" in 45 CFR § 164.501 and shall include a person who qualifies as a personal representative in accordance with 45 CFR § 164.502(g).
 - 1.4 **Protected Health Information.** "Protected Health Information" shall have the same meaning as the term "protected health information" in 45 CFR § 164.501, limited to the information created or received by Business Associate from or on behalf of Covered Entity.
 - 1.5 **Required By Law.** "Required By Law" shall have the same meaning as the term "required by law" in 45 CFR § 164.501.
 - 1.6 **Secretary.** "Secretary" shall mean the Secretary of the Department of Health and Human Services or his designee.
 - 1.7 **Unsecured Protected Health Information.** "Unsecured Protected Health Information" or "Unsecured PHI" shall mean Protected Health Information that is not secured through the use of a technology or

methodology specified by the Secretary in guidance or as otherwise defined in § 13402(h) of the HITECH Act.

2. **Permitted Uses and Disclosures by Business Associate.** Except as otherwise limited in this Business Associate Agreement, Business Associate may use or disclose Protected Health Information to perform functions, activities, or services for, or on behalf of, Covered Entity as specified in the License Agreement or otherwise as agreed to between the parties, provided that such use or disclosure would not violate the Privacy Rule if done by Covered Entity or the minimum necessary policies and procedures of the Covered Entity.
3. **Obligations and Activities of Business Associate.**
 - 3.1 **Use and Disclosure of Protected Health Information.** Business Associate agrees not to use or disclose Protected Health Information other than as permitted or required by this Business Associate Agreement or as Required by Law.
 - 3.2 **Safeguards Against Misuse of Protected Health Information.** Business Associate agrees to use appropriate safeguards to prevent use or disclosure of the Protected Health Information other than as provided for by this Business Associate Agreement.
 - 3.3 **Reporting of Disclosures of Protected Health Information.** Business Associate agrees to report to Covered Entity any use or disclosure of the Protected Health Information not provided for by this Business Associate Agreement or the License Agreement of which it becomes aware.
 - 3.4 **Breach Notification.** Business Associate agrees to notify Covered Entity of a Breach of Unsecured PHI following the first day on which Business Associate (or Business Associate's employee, officer or agent) knows of such Breach. Business Associate's notification to Covered Entity shall:
 - a. Be made to Covered Entity no later than sixty (60) calendar days after discovery of the Breach, except where a law enforcement official determines that a notification would impede a criminal investigation or cause damage to national security;
 - b. Include the individuals whose Unsecured PHI has been, or is reasonably believed to have been, the subject of a Breach; and
 - c. Be in substantially the same form as Exhibit A hereto.
 - 3.5 **Agreements with Third Parties.** Business Associate agrees to ensure that any agent, including a subcontractor, to whom it provides Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity, agrees to the same restrictions and conditions that apply through this Business Associate Agreement to Business Associate with respect to such information.
 - 3.6 **Access to Protected Health Information.** Within thirty (30) days after receipt of a written request from Covered Entity, Business Associate agrees to provide access (i) to Protected Health Information in a Designated Record Set to Covered Entity or, as directed by Covered Entity, to an Individual in order to meet the requirements under 45 CFR § 164.524 (this provision will not apply to

Business Associate if Business Associate does not have Protected Health Information in a Designated Record Set); and (ii) to its premises for a review and demonstration of its internal practices and procedures for safeguarding Protected Health Information.

- 3.7 Amendments to Protected Health Information.** Within thirty (30) days after receipt of a written request from Covered Entity, Business Associate agrees to make any amendment(s) to Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity, contained in a Designated Record Set, that the Covered Entity directs about an Individual. This provision will not apply to Business Associate if Business Associate does not have Protected Health Information in a Designated Record Set.
- 3.8 Availability of Books and Records.** Business Associate agrees to make internal practices, books, and records, including policies and procedures and Protected Health Information, relating to the use and disclosure of Protected Health Information received from, or created or received by Business Associate on behalf of, Covered Entity, available to the Secretary for purposes of the Secretary determining Covered Entity's compliance with the Privacy Rule.
- 3.9 Accounting of Disclosures.** Business Associate agrees to document such disclosures of Protected Health Information and information related to such disclosures as would be required for Covered Entity to respond to a request by an Individual for an accounting of disclosures of Protected Health Information in accordance with 45 CFR § 164.528. Within thirty (30) days after receipt of a written request from Covered Entity, Business Associate agrees to make such documentation available to Covered Entity.
- 3.10 Use of Protected Health Information for Proper Management.** Business Associate may use Protected Health Information for the proper management and administration of the Business Associate or to carry out its legal and contractual responsibilities.
- 3.11 Disclosure of Protected Health Information for Proper Management.** Except as otherwise limited in this Business Associate Agreement, Business Associate may disclose Protected Health Information for the proper management and administration of the Business Associate, provided that disclosures are Required By Law, or Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and will be used or further disclosed only as Required By Law or for the purpose for which it was disclosed to the person, and the person notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.
- 3.12 Data Aggregation Services.** Except as otherwise limited in this Business Associate Agreement, Business Associate may use Protected Health Information to provide Data Aggregation services to Covered Entity as permitted by 45 CFR § 164.504(e)(2)(i)(B).
- 3.13 Reporting Violations of Law.** Business Associate may use Protected Health Information to report violations of law to appropriate Federal and State authorities, consistent with § 164.502(j)(1).

4. Obligations of Covered Entity.

- 4.1 Limitations in Notice of Privacy Practices.** Covered Entity shall notify Business Associate of any limitation(s) in its notice of privacy practices to an Individual pursuant to the Privacy Rule, to the extent that such limitation may affect Business Associate's use or disclosure of Protected Health Information.
- 4.2 Revocation of Permission.** Covered Entity shall notify Business Associate of any changes in, or revocation of, permission by an Individual to use or disclose Protected Health Information, to the extent that such changes may affect Business Associate's use or disclosure of Protected Health Information.
- 4.3 Agreed Upon Restrictions.** Covered Entity shall notify Business Associate of any restriction to the use or disclosure of Protected Health Information that Covered Entity has agreed to in accordance with 45 CFR § 164.522, to the extent that such restriction may affect Business Associate's use or disclosure of Protected Health Information.
- 4.4 Minimal Disclosure.** Covered Entity shall disclose to Business Associate only the minimum amount of Protected Health Information necessary to allow Business Associate to fulfill its obligations to Covered Entity under the License Agreement. Wherever practicable, Covered Entity will redact personal identifiers from Protected Health Information disclosed to Business Associate.

5. Term and Termination of Business Associate Agreement.

- 5.1 Term.** The Term of this Business Associate Agreement shall be effective as of the Effective Date and shall terminate when all of the Protected Health Information provided by Covered Entity to Business Associate, or created or received by Business Associate on behalf of Covered Entity, is destroyed or returned to Covered Entity, or, if it is infeasible to return or destroy Protected Health Information, protections are extended to such information, in accordance with the termination provisions in this Section.
- 5.2 Termination for Cause.** Upon Covered Entity's knowledge of a material breach of this Business Associate Agreement by Business Associate, Covered Entity shall either:
- (a) Provide an opportunity for Business Associate to cure the breach or end the violation and terminate this Business Associate Agreement if Business Associate does not cure the breach or end the violation within thirty (30) days after receipt of written notice from Covered Entity;
 - (b) Immediately terminate this Business Associate Agreement if Business Associate has breached a material term of this Business Associate Agreement and cure is not possible; or
 - (c) If neither termination nor cure is feasible, Covered Entity may report the violation to the Secretary.

5.3 Effect of Termination. Upon termination of this Business Associate Agreement for any reason, Business Associate shall extend the protections of this Agreement to such Protected Health Information and limit further uses and disclosures of such Protected Health Information to those purposes that are required by law or consistent with any continuing obligations of the License Agreement for so long as Business Associate maintains such Protected Health Information.

6. Indemnification. Each party (the "Indemnifying Party") will indemnify and hold harmless the other party and its partners, directors, officers, employees, agents and subcontractors (each an "Indemnified Party") from and against all actions, liabilities, damages, penalties, losses, awards, judgments, settlements consented to by the Indemnifying Party, proceedings and demands related to, arising out of or in any way connected with any third party claim resulting from the breach of this Business Associate Agreement by the Indemnifying Party, the negligent acts or omissions or willful misconduct of the Indemnifying Party, or any violation of applicable law by the Indemnifying Party.

7. Governing Law. This Business Associate Agreement shall be interpreted, construed, and enforced in accordance with the substantive law of the State of Texas, without giving effect to the conflict of laws principles thereof. Venue for any dispute involving the interpretation or enforcement of this Business Associate Agreement shall be in either the courts of the State of Texas or in federal courts located within the State of Texas as appropriate.

8. Notice. All notices and other communications permitted or required to be given hereunder shall be in writing and either: (i) delivered in person; (ii) sent by express mail or other overnight delivery service providing receipt of delivery; (iii) mailed by certified or registered mail, postage prepaid, return receipt requested; or (iv) sent by facsimile transmission (with confirmation of receipt) as follows:

If to Business Associate: eScan Data Systems, Inc.
P.O. Box 6457
Austin, Texas 78762

Attn: Greg Pitzer, EVP
Phone: 512-306-1184
Fax: 512-804-1877
email: greg_pitzer@escandatasystems.com

If to Covered Entity: _____

Attn: _____
Phone: _____
Fax: _____
email: _____

10. Miscellaneous.

- 10.1 Regulatory References.** A reference in this Business Associate Agreement to a section in the Privacy Rule means the section as in effect or as amended.
- 10.2 Survival.** The respective rights and obligations of Business Associate under Section 5.3 (Effect of Termination) of this Business Associate Agreement shall survive the termination of this Business Associate Agreement.
- 10.3 Interpretation.** Any ambiguity in this Business Associate Agreement shall be resolved to permit Covered Entity to comply with the Privacy Rule.
- 10.4 Inconsistent Terms.** The terms and conditions of this Business Associate Agreement control over and supersede any inconsistent terms in the License Agreement.
- 10.5 Amendment and Modification.** This Business Associate Agreement may only be amended or modified by an instrument in writing signed by duly authorized representatives of the parties. The Parties agree to take such action as is necessary to amend this Business Associate Agreement from time to time as is necessary for Covered Entity to comply with the requirements of the Privacy Rule and the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.
- 10.6 Headings.** The headings contained in this Business Associate Agreement are for convenience of reference only and do not define or limit the provisions hereof.
- 10.7 Counterparts and Facsimile Signature.** This Business Associate Agreement may be executed in any number of counterparts, each of which will be deemed an original, but all of which together will constitute one and the same instrument. A facsimile copy of this Business Associate Agreement will be treated as an original and will be admissible as evidence of this Business Associate Agreement.

[Signature page to follow.]

IN WITNESS WHEREOF, the parties have executed this Business Associate Agreement as of the date first written above.

eScan Data Systems, Inc

Covered Entity:

By: _____
Name: Greg Pitzer
Title: EVP

By: _____
Name: _____
Title: _____

Exhibit A

This notification is made pursuant to Section 3.4 of the Business Associate Agreement between eScan Data Systems, Inc., a Texas corporation (“Business Associate”), and _____ (“Covered Entity”).

Business Associate hereby notifies Covered Entity that there has been a breach of unsecured (unencrypted) protected health information (PHI) that Business Associate has used or has had access to under the terms of the Business Associate Agreement.

Description of the breach: **[Insert]**

Date of the breach: **[Insert]**

Date of the discovery of the breach: **[Insert]**

Number of individuals affected by the breach: **[Insert]**

The types of unsecured PHI that were involved in the breach (such as full name, Social Security number, date of birth, home address, account number, or disability code): **[Insert]**

Any steps individuals should take to protect themselves from harm resulting from the breach: **[Insert]**

Description of what Business Associate is doing to investigate the breach, to mitigate losses, and to protect against any further breaches: **[Insert]**

Contact information to ask questions or learn additional information:

Name:

Title:

Address:

Email Address:

Toll-free Phone Number:

Website: